Filed 11/3/10 In re Jose C. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re JOSE C., a Person Coming Under the Juvenile Court Law.	B221868 (Los Angeles County Super. Ct. No. VJ 37544)
THE PEOPLE, Plaintiff and Respondent, v. JOSE C., Defendant and Appellant.	

APPEAL from an adjudication of the Superior Court of Los Angeles County. Heidi Shirley, Judge. Affirmed.

Jeanine G. Strong, under appointment by the Court of Appeal for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Blythe J. Leszkay and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * *

The minor, Jose C., appeals from the juvenile court's sustaining of a petition charging him with possession of a controlled substance, Ecstasy, and possession of marijuana. Appellant contends the court committed reversible error in denying his motion to dismiss made at the close of the prosecution's case for insufficiency of evidence that Ecstasy is a controlled substance or controlled substance analog. He further contends that the court abused its discretion in allowing the prosecution to reopen its case and erred in denying his renewed motion to dismiss after the prosecution rested following the reopening of evidence. We disagree and therefore affirm the adjudication.

FACTS

On the afternoon of September 9, 2009, two Los Angeles County Sheriff's Deputies were on routine patrol in the vicinity of Long Beach Boulevard and Agnes Street in the City of Lynwood. The deputies were in uniform and in a marked patrol car. From about 15 feet away, they saw appellant standing on the sidewalk looking in their direction. Appellant had something in his hand and suddenly tossed it away from him to the ground. The object was a "very distinct" baggie containing a green, leafy substance resembling marijuana. After recovering the baggie, one of the deputies searched appellant and discovered a yellow pill in a clear plastic baggie in appellant's left shorts pocket. The deputies believed the pill to be Ecstasy based on its shape and texture, and they arrested appellant.

PROCEDURAL HISTORY

The district attorney filed a petition charging appellant in two counts: (1) possession of a controlled substance, namely, methylenedioxymethamphetamine (Ecstasy), a felony, in violation of Health and Safety Code[1] section 11377, subdivision (a); and (2) possession of marijuana, a misdemeanor, in violation of section 11357, subdivision (b).

---

[1] All further statutory references are to the Health and Safety Code unless otherwise noted.

At the adjudication hearing on November 23, 2009, Victor Wong, a chemist and senior criminalist for the Los Angeles County Sheriff's Department, testified for the prosecution. Wong testified that he had worked for the department for 26 years and had analyzed controlled substances for the last 19 years. He analyzed the yellow tablet the narcotics detectives submitted to the laboratory and subjected it to testing using an infrared spectrometer and GCMS-chromatography mass spectroscopy. After analysis, he concluded the yellow tablet contained "MDMA otherwise known as methylenedioxymethamphetamine," known by its common name, "Ecstasy."[2] On cross-examination, Wong reiterated the compound was "3, 4 methylenedioxymethamphetamine, or MDMA." In response to counsel's query whether the substance was "just a salt or an isomer," he testified, "That, I do not know. Most likely a salt converted to the base."

The prosecutor then examined one of the deputies and presented evidence of the circumstances of appellant's arrest.

After the prosecution presented its case-in-chief, appellant's counsel moved to dismiss based on an unspecified insufficiency of the evidence. The juvenile court denied the motion, and the defense rested.

The prosecutor presented her closing argument, and the defense then argued that because 3, 4 methylenedioxymethamphetamine was not a controlled substance classified in the schedules to section 11054, the prosecution had not proved beyond a reasonable doubt that appellant was in violation of section 11377, subdivision (a). Following some colloquy, the juvenile court stated that "perhaps we need to get Mr. Wong back here . . . [¶] . . . [¶] . . . to clarify this." Appellant's counsel objected that "they [the prosecution] had their opportunity to call their witness." When the court told appellant's counsel it "didn't hear you questioning him on [this]," she responded she "did not want to purposely for this reason," adding, "It's not my burden."

---

[2] He testified a second substance the narcotics detectives submitted consisted of 2.24 grams of marijuana.

The prosecutor asserted the "exact name" was included in section 11054, subdivision (d), and there was some discussion whether that was the case.[3] Wong had testified the substance in the yellow pill was "3, 4 methylenedioxy*meth*amphetamine" or "MDMA or Ecstasy." (Italics added.) The petition correspondingly charged appellant with unlawfully possessing "a controlled substance, to wit, Methylenedioxy*meth*amphetamine (Ecstasy)." (Italics added.) However, defense counsel objected that such a substance was not listed under that exact name in section 11054, subdivision (d).[4] Stating it did not "have enough expertise" to say whether the distinction in terminology was consequential, the court concluded, "we need to get Mr. Wong back in here and ask him about this." The matter was continued for a week to allow Wong to return and testify.

Upon his recall to the stand, Wong testified that MDMA is a controlled substance analog, i.e., it is substantially similar to the chemical structure of a controlled substance, methamphetamine. He explained that "[i]t basically means that there's two oxygens and a methylene added to it." He analogized its components to a train having a locomotive in front, three freight cars and a caboose in the back, explaining, "MDMA is basically adding something behind the caboose. . . . [¶] So you still have the main structure of methamphetamine, but you altered the whole structure by adding something else on, and that is considered [an] analogue." He answered "Yes" when asked whether it was correct that MDMA falls "within the schedule of methamphetamine plus additional ingredients." When queried by defense counsel, Wong testified that Ecstasy is a manmade drug, and it can include different variations of compounds and ingredients. One Ecstasy pill may differ from the next, as there is no "quality control" and such a pill is a "smorgasbord" depending on what was produced in the particular batch. He conceded that MDMA is not

---

3 In fact, the prosecutor was mistaken in stating the "exact name" is listed in section 11054, subdivision (d).

4 The controlled substance listed in Schedule I, section 11054, subdivision (d)(6), was "3, 4--methylenedioxy amphetamine."

the same as "MDA," which lacks two oxygen groups contained in MDMA. On re-direct examination, Wong stated that although MDMA is not specifically included in the schedules, it qualifies as a controlled substance analog under section 11401. He explained that an analog has a chemical structure that is "substantially similar" to the chemical structure of a controlled substance classified under sections 11054 or 11055: "basically it's adding on a . . . little accessory to the main drug." He testified that MDMA is "MDA plus."

Following Wong's additional testimony, appellant again moved to dismiss, arguing the prosecution had failed to prove beyond a reasonable doubt that he possessed a controlled substance. The juvenile court found the prosecution had proved the allegations of the petition beyond a reasonable doubt. The court found, based on the testimony of the criminalist, that although MDMA contains some extra ingredients that were likely added in an attempt to evade the statute, it is an analog substantially similar "in all relevant matters" to a listed substance. However, at the defense attorney's request, the juvenile court reduced the felony charge to a misdemeanor, taking into consideration that appellant possessed only one Ecstasy pill and there was no indication he possessed the controlled substance for sale.

The juvenile court therefore sustained both counts of the petition. The court found appellant to be a ward of the court and ordered appellant to be detained in juvenile hall pending suitable placement.

Appellant timely appealed the juvenile court's order.

STANDARD OF REVIEW

Our standard of review when there is a challenge to the sufficiency of the evidence to support a criminal conviction is well established. We review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is reasonable, credible and of solid value such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Story* (2009) 45 Cal.4th 1282, 1296.)

DISCUSSION

1. The Juvenile Court Properly Exercised Its Discretion in Reopening the Evidence

Welfare and Institutions Code section 701.1 provides a minor's counsel may request, at the close of the prosecution's case, that the court enter a judgment of dismissal. (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 727.) The courts have held that Welfare and Institutions Code section 701.1 is substantially similar to Penal Code section 1118, which governs motions to acquit in criminal trials when a jury is waived, and thus that the "rules and procedures applicable to [Penal Code] section 1118 . . . apply with equal force to juvenile proceedings." (*In re Man J.* (1983) 149 Cal.App.3d 475, 482; see also *Anthony J.*, *supra*, at p. 727.) In a criminal case, upon a motion for acquittal, the trial court is required to weigh the evidence, evaluate the credibility of witnesses, and determine that the case against the defendant is proved beyond a reasonable doubt before the defendant is called upon to put on a defense. This requirement similarly applies to motions to dismiss brought in juvenile proceedings. (*Anthony J.*, *supra*, at pp. 727-728.) The substantial evidence test applies both when an appellate court is reviewing on appeal the sufficiency of the evidence to support a conviction and when a trial court is deciding the same issue in ruling on a motion for acquittal at the close of evidence. (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.)

We accordingly "review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Cole* (2004) 33 Cal.4th 1158, 1212.) We independently review the trial court's decision. (*Id.* at p. 1213.) When a motion to acquit is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point. (*People v. Trevino* (1985) 39 Cal.3d 667, 695, disapproved on another point in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221; *People v Belton* (1979) 23 Cal.3d 516, 521.)

Appellant argues that at the time he first moved to dismiss, the prosecution had failed to present any evidence that MDMA was a controlled substance or an analog of a

controlled substance. There is no dispute that MDMA was not specifically listed in any of the schedules of controlled substances. The prosecution suggested to the juvenile court that MDMA was a Schedule I hallucinogenic under section 11054, subdivision (d)(6), i.e., " 3, 4--methylenedioxy amphetamine," or a Schedule II stimulant under section 11055, subdivision (d)(2), i.e., "Methamphetamine, its salts, isomers, and salts of its isomers." However, the petition alleged appellant possessed "Methylenedioxy*meth*amphetamine" or "Ecstasy" and the criminalist testified the yellow tablet he tested contained "MDMA otherwise known as methylenedioxy*meth*amphetamine,"[5] known by its common name, "Ecstasy." (Italics added.) Based on this discrepancy, defense counsel asserted the prosecution had not proved "MDMA" or "Ecstasy" was a controlled substance. The juvenile court expressed doubt whether methylenedioxy*meth*amphetamine was a controlled substance described in the code and observed it lacked expertise to determine whether the additional syllable "meth" constituted a consequential distinction from the listed substance.

Respondent asserts the evidence before the court comprised sufficient evidence for the court to conclude MDMA is a controlled substance, and the weight of the evidence was a matter for the juvenile court. It is clear from the foregoing comments that the juvenile court made no such determination at the time. Nor do we agree with respondent's contention that a panel of our colleagues in Division Six has already ruled that MDMA is "'an analog of methamphetamine, a controlled substance.'" (*People v. Silver* (1991) 230 Cal.App.3d 389, 392.) Rather, the appellate court in *Silver* held the trier of fact appropriately found upon the conflicting testimony of experts that MDMA is "substantially similar" to, and an analog of, methamphetamine and thus is a controlled substance. (*Id.* at pp. 392-393, 396.)

---

5 As noted, the criminalist also testified the compound was "3, 4 methylenedioxymethamphetamine, or MDMA" and "most likely a salt converted to the base."

In the context of jury trials in a criminal case (see Pen. Code, §§ 1093 & 1094), it is well established that the trial court has broad discretion to order a case reopened and allow the introduction of additional evidence. (*People v. Riley* (2010) 185 Cal.App.4th 754, 764 (*Riley*); *People v. Goss* (1992) 7 Cal.App.4th 702, 706 (*Goss*).) The court has no less discretion in a court tried case. (See, e.g., Pen. Code, § 1044 [duty of judge to "control all proceedings"]; Evid. Code, § 320 [discretion of court to "regulate the order of proof"].) No error ensues from granting a request to reopen evidence absent a showing of abuse. (*People v. Rodriguez* (1984) 152 Cal.App.3d 289, 295 (*Rodriguez*).) Factors to be considered in reviewing whether the court's discretion has been abused include the stage the proceedings had reached when the motion was made, the moving party's diligence in discovering the new evidence, the possibility that undue emphasis would be placed on such evidence before a jury, and the significance of the evidence. (*Riley, supra,* at p. 764; see also *Goss, supra,* at p. 706.)

In the instant case, following a brief trial in which only two witnesses testified, the prosecution rested its case-in-chief. Defense counsel then moved for a dismissal based on insufficiency of evidence without elaboration. The court denied the motion. After the defense rested, the prosecutor made a very brief closing argument. Only then did defense counsel voice a challenge to categorizing MDMA as a "controlled substance" and assert the prosecution failed to provide evidence that possession of MDMA was illegal. Even at this stage, the court had not yet made its decision in the case and the case had yet to be submitted.

Defense counsel urged in her closing argument that the evidence was insufficient because the compound the chemist testified he found in the Ecstasy pill was not listed in any of the schedules. When the court noted counsel had not cross-examined the criminalist on this point, she indicated she "did not want to purposely for this reason." The defense therefore knew all along whether MDMA qualified as a controlled substance would be a part of the case. The defense counsel made a tactical decision not to cross-examine the criminalist on this issue. On the other hand, the record indicates the prosecutor was of the belief MDMA was listed in the schedules and no evidence was

needed in that regard. The prosecution's overlooking such evidence thus appears to have been the result of inadvertence or mistake rather than any design to gain a tactical advantage over the defense. The court has discretion to permit the prosecution to reopen after a Penal Code section 1118 or section 1118.1 motion "so long as the court is convinced that the failure to present evidence on the issue was a result of 'inadvertence or mistake on the part of the prosecutor and not from an attempt to gain a tactical advantage over [the defendant].' [Citation.]" (*Goss*, *supra*, 7 Cal.App.4th at p. 708; see also *Riley*, *supra*, 185 Cal.App.4th at pp. 764-765 [no distinction made between motions for acquittal made under §§ 1118 or 1118.1].)

The petition was being tried to the juvenile court, and there was therefore no question of undue influence upon a jury. Finally, the new evidence went to the very essence of the charges laid against appellant in the petition. The reopening of a case for further evidence was within the sound discretion of the juvenile court, and the record shows no abuse of that discretion. Reopening a case to take further evidence presents "a very common occurrence in the trial of criminal cases and within the discretion of the trial court and not violative of any of the defendant's rights." (*People v. Hamil* (1925) 73 Cal.App. 649, 654; see also *Rodriguez*, *supra*, 152 Cal.App.3d at p. 295 ["appellate court decisions upholding an order allowing the prosecution to reopen its case are legion"]; see 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 554, p. 790.)

Because the juvenile court had the power and discretion to reopen the proceedings to take further evidence, appellant's claim that the court erred in denying his initial motion to dismiss because it had to consider only the evidence at the time the motion is made is without merit. There is no basis to appellant's claim that the court was barred from reopening the evidence once he made a motion to dismiss. As the court in *Riley* noted, "The purpose of [Penal Code] section 1118.1 is to provide a procedure by which a defendant may promptly terminate a fatally deficient prosecution, not to provide the defendant with a tactical trap when the prosecution inadvertently fails to present evidence in its possession. [W]here the prosecutor simply made a mistake and failed to present evidence that the prosecution had in its possession, the fact that the defendant moved for

judgment of acquittal pursuant to section 1118.1 should not categorically prohibit the trial court from exercising the discretion granted to it under [Penal Code] sections 1093 and 1094." (*Riley, supra*, 185 Cal.App.4th at p. 766.)

2. The Juvenile Court Properly Denied the Defense Motion to Dismiss Following Receipt of Additional Evidence

Appellant concedes that if the prosecution proved MDMA is an analog of methamphetamine, it is a Schedule II controlled substance under section 11055, subdivision (d)(2). However, appellant contends that even after re-opening, the evidence did not establish that the MDMA the deputies discovered on his person constituted a controlled substance. We disagree.

On re-opening, the criminalist specifically testified that "MDMA is a controlled substance analogue." He testified MDMA is "substantially similar" to the chemical structure of methamphetamine, a controlled substance. He explained that MDMA has the "main structure" of methamphetamine with additional substances making it an analog of methamphetamine. He described MDMA as "MDA plus."

Under section 11377, it is unlawful to possess controlled substances including those specifically described in subdivision (d) of section 11055. (§ 11377, subd. (a).) Section 11401, subdivision (a) provides that a "controlled substance analog shall, for the purposes of Chapter 6 (commencing with Section 11350), be treated the same as the controlled substance classified in Section 11054 or 11055 of which it is an analog." A controlled substance analog, in turn, is defined as a substance that is "substantially similar" to a controlled substance in terms of its chemical structure or its effect on the central nervous system. (§ 11401, subd. (b)(1), (2).) The criminalist testified he found the substance in the yellow pill to be an analog of methamphetamine, i.e., it had a chemical structure "substantially similar" to methamphetamine, which is without question a controlled substance listed in section 11055, subdivision (d)(2). The prosecution accordingly factually established that MDMA is an analog of a Schedule II substance, i.e., its chemical structure is substantially similar to that of a controlled

substance. (§ 11401, subd. (b)(1).) Thus, the pill appellant possessed was among the substances proscribed by section 11377.

It is crystal clear, therefore, that substantial evidence supports the juvenile court's finding appellant was in possession of a controlled substance. We accord the juvenile court's conclusion great weight. (*People v. Kelly* (1990) 51 Cal.3d 931, 947.)

DISPOSITION

The adjudication is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, ACTING P. J.

We concur:

GRIMES, J.

O'CONNELL, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.